PEMBENAAN LEOW TUCK CHUI & SONS SDN. BHD.

v.

DR. LEELA'S MEDICAL CENTRE SDN. BHD.

SUPREME COURT, KUALA LUMPUR
TAN SRI DATO' HJ. MOHD. EUSOFF CHIN CJ
TAN SRI DATO' EDGAR JOSEPH JR. SCJ
DATO' MOHAMED DZAIDDIN BIN HJ. ABDULLAH SCJ
[CIVIL APPEAL NO. 02-538-93]
13 APRIL 1995

***CONTRACT**: Building contract - Construction - Whether subject to special rules - Contractual relationship of parties therein - Whether bound by special principles.*

***CONTRACT**: Building contract - Progress payment - Interim certificate by architect - Whether to be strictly honoured - Certificate disputed by employer - Whether builder still entitled to full payment - Set off against payment - Whether permissible - Whether common law rights of set off excluded by terms of contract.*

***PRACTICE & PROCEDURE**: Building contract - Order 14 application - Claim for progress payment pursuant to interim certificate by architect - Defendant pleading cross claim and rights of set-off as defence - Whether allowable - Proper approach - Whether Court to take a robust approach.*

In 1989 the parties herein entered into a building contract in which the appellant agreed to build a private hospital for the respondent known as "Dr. Leela Medical Centre". The agreement provided for progress payment for work done and for the issuance of interim certificates by the architect for the purpose. The agreement also contained clauses which allowed the respondent to make deductions from certain payments due to the appellant, but none of these clauses, however, permitted the respondent to set-off against payment on interim certificates.

Sometime in 1992, after the completion of the hospital, the architect issued the Penultimate Progress Payment Certificate in favour of the appellant for the sum of RM 433,288.97. This certificate was, for the purposes of the agreement, an interim certificate referred to therein. The respondent refused to honour the said certificate whereupon the appellant applied for summary judgment of the certified sum. The respondent objected and filed a cross claim for defective workmanship, and further sought to set off the amounts thus claimed against payment on the said interim certificate.

The learned Judge ruled that the cross claim had evidenced clear triable issues and hence refused summary judgment. The appellant appealed and before the Supreme Court the primary issues that arose were:

1. Whether, in an O.14 proceeding herein, having regard to the wordings of the contract, the rights to set-off or counter claim could properly be raised by the respondent in answer to the said interim certificate.

2. If not, whether the appellant was entitled to obtain in full the payment in question, notwithstanding that the said certificate was disputed by the respondent.

Held:

[1] The parties to building contracts are entitled to incorporate in their contract any clause they please. There is nothing to prevent them extinguishing, curtailing or enlarging the ordinary rights of set-off, provided they do so expressly or by clear implication. There is however no special rule of construction operating in the building contract cases, and when parties enter into a detailed building contract, there are no overriding principles covering their contractual relationship beyond those which generally apply to the construction of contracts.

[2] The question whether the respondent is entitled to refuse to make payment of money to the appellant, allegedly due and payable under the said interim certificate, would depend on the terms of the contract in question. Going by the terms of the contract, however, nowhere was it provided that the appellant must execute the works to the satisfaction of the respondent. According to the contract, the only instructions with which the appellant is obliged to comply are those that emanated from the architect. There being no such instructions, it follows that the appellant was under no contractual obligation to comply with the complaints of the respondent herein. On the terms of the contract, the respondent's remedies, if any, must lie against the architect.

[3] In a building contract of this nature, the ordinary common law right of set-off applicable is that, when the person for whom the work has been done is sued by the contractor for the price, it is open to the defendant, in the absence of a provision in the contract to the contrary, to defend himself by setting off against the amount claimed, any damages which he has sustained as a result of the plaintiff's breach of the contract. However, on the basis of *expressio unius* principle, the express enumeration of permitted set-offs in a building contract can imply that a defendant builder or main contractor, as the case may be, is limited to making such deductions from the amounts claimed as fall strictly within the scope of the permitted set-offs, and nothing else.

[4] In the present case, there are seven express provisions in the contract whereby the employer has the right of set-off but none of them is relevant to its alleged right to make the set-off for which it contends. Therefore, regard being had to these provisions of the contract, and applying the *expressio unius* principle, there is a clear implication that, so far as claims for payment on certificates are concerned, the ordinary common law rights of set-off was to be extinguished. In the event, the appellant is entitled to full payment of the sum certified to be due and payable to it under the Penultimate Progress Payment Certificate.

[5] In dealing with ordinary builder's claim under O.14, it is proper that the Courts take a robust approach. Inter alia, this means that once a certificate by the architect is being tendered, the Court ought to require cogent evidence from the defendant before granting leave to defend. It also means that in appropriate circumstances, the Court may just avail itself to the jurisdiction of the said order, notwithstanding that there was an arbitration clause calling for arbitration of the disputed matter.

[Appeal allowed. Judgment of High Court set aside. Summary judgement entered for the appellant].

[**Bahasa Malaysia** Translation of Headnotes]

***KONTRAK**: Kontrak binaan - Pentafsiran - Samada tertakluk kepada peraturan khas - Hubungan kontraktual pihak-pihak di dalamnya - Samada diikat oleh prinsip khas.*

***KONTRAK**: Kontrak binaan - Bayaran kemajuan - Sijil interim oleh arkitek - Samada mesti dipatuhi dengan ketatnya - Sijil dipertikai oleh majikan - Samada pembina masih berhak kepada pembayaran yang penuh - Tolakan terhadap pembayaran - Samada dibolehkan - Samada hak di sisi common law kepada tolakan diketepikan oleh terma kontrak.*

***AMALAN & PROSEDUR**: Kontrak binaan - Permohonan Aturan 14 - Tuntutan bayaran kemajuan ekoran sijil interim oleh arkitek - Defendan memplid tuntutan balas dan hak kepada tolakan sebagai pembelaan - Samada dibenarkan - Pendekatan yang wajar - Samada Mahkamah patut mengambil pendekatan yang robust.*

Dalam tahun 1989 pihak-pihak di dalam kes ini telah menandatangani satu kontrak binaan dimana perayu bersetuju untuk membina sebuah hospital persendirian untuk responden yang dikenali sebagai "Dr Leela Medical Centre". Perjanjian itu menyebut bahawa bagi kerja-kerja yang disiapkan bayaran kemajuan akan dibuat, dan untuk tujuan ini sijil interim akan dikeluarkan oleh arkitek. Perjanjian itu juga mengandungi beberapa peruntukan membenarkan responden membuat potongan terhadap beberapa pembayaran tertentu yang dibayar kepada perayu, tetapi tidak satu pun dari peruntukan-peruntukan berkenaan mengizinkan potongan terhadap pembayaran di atas sijil interim.

Pada tahun 1992, setelah hospital tersebut siap dibina, satu Sijil Pembayaran Kemajuan Penultimate telah dikeluarkan oleh arkitek kepada perayu bernilai RM 433,288.97. Sijil ini, bagi semua maksud perjanjian berkenaan, adalah suatu sijil interim yang disebut di dalamnya. Responden enggan membayar jumlah wang yang disahkan itu dan akibatnya perayu membuat permohonan untuk penghakiman terus bagi jumlah tersebut. Responden membantah dan memfail satu tuntutan balas kerana kecacatan mutukerja, disamping memohon untuk membuat tolakan terhadap pembayaran di atas sijil interim.

Yang Arif Hakim memutuskan bahawa tuntutan balas di atas telah membangkitkan beberapa isu yang perlu dibicarakan dan dengan itu enggan memberi penghakiman terus. Perayu merayu dan di hadapan Mahkamah Agung isu penting yang timbul ialah:

1. Samada, di dalam prosiding Aturan 14 di sini, hak kepada tolakan atau tuntutan balas boleh dibangkitkan dengan teraturnya oleh responden sebagai jawapan kepada sijil interim tersebut.

2. Jika tidak, samada perayu berhak untuk mendapatkan sepenuhnya pembayaran tersebut, walaupun ketepatan sijil interim dipertikaikan oleh responden.

Diputuskan:

[1] Pihak-pihak kepada kontrak binaan adalah berhak untuk memasukkan di dalam perjanjian mereka apa jua peruntukan yang mereka suka. Tiada apa pun yang boleh menghalang mereka dari melupuskan, mengecilkan atau mengembangkan hak-hak biasa kepada sesuatu tolakan, dengan syarat mereka berbuat demikian secara nyata atau melalui implikasi yang jelas. Walau pun begitu, tidak terdapat peraturan pentafsiran yang khas bagi kes-kes kontrak binaan. Oleh hal yang demikian, apabila satu kontrak binaan yang terperinci dimeterai oleh mereka, tidak ada prinsip khas yang mengawal hubungan kontraktual mereka selain dari peraturan atau prinsip biasa yang dipakai untuk mentafsir sesuatu kontrak.

[2] Persoalan samada responden berhak untuk enggan membayar kepada perayu jumlah wang yang dikatakan sebagai patut dibayar dibawah sijil interim berkenaan, adalah bergantung kepada terma kontrak terbabit. Berdasarkan terma-terma kontrak tersebut, tidak terdapat apa-apa pun di dalamnya yang mengkehendakki perayu menyempurnakan kerja-kerjanya mengikut kepuasan hati responden. Menurut kontrak, hanya arahan yang dibuat oleh arkitek yang perlu dipatuhi oleh perayu. Oleh kerana arahan sedemikian tidak ada, maka jelaslah bahawa perayu tidak diikat oleh apa-apa obligasi kontraktual untuk melayan bantahan yang dibuat oleh responden di sini. Berdasarkan terma kontrak, remedi responden, jikapun ada, adalah terhadap arkitek.

[3] Di dalam kontrak binaan seperti ini, prinsip common law berhubung dengan tolakan yang terpakai ialah, apabila seseorang untuk siapa sesuatu kerja itu di buat di saman oleh kontraktornya untuk harga kerja, ianya adalah terbuka bagi defendan itu, dimana tidak terdapat apa-apa peruntukan didalam kontrak yang bertentangan dengannya, untuk membela dirinya dengan membuat tolakan terhadap jumlah yang dituntut, apa-apa kerugian yang dialaminya akibat dari kemungkiran plaintif. Bagaimanapun, berdasarkan prinsip *expressio unius*, dengan sesuatu kontrak itu mengandungi peruntukan yang membenarkan tolakan secara nyata, ianya boleh memberi implikasi bahawa seorang pembina bangunan, yang juga seorang defendan, atau pun seorang kontraktor, hanya boleh membuat tolakan setakat yang diizinkan oleh skop pembenaran tolakan tersebut, tidak lebih dari itu.

[4] Di dalam kes ini, terdapat tujuh peruntukan nyata di dalam kontrak di mana responden diberi hak untuk membuat tolakan, tetapi tiada satu pun mempunyai hubungan dengan hak membuat tolakan seperti yang dituntut oleh responden. Oleh itu, mengambil kira peruntukan-peruntukan tersebut, dan menggunapakai peraturan *expressio unius*, wujud implikasi yang nyata, berhubung dengan pembayaran di atas sijil interim, bahawa hak terhadap tolakan di sisi undang-undang biasa common law telah dilupuskan. Oleh hal yang demikian, perayu adalah berhak kepada pembayaran penuh terhadap bayaran yang telah disahkan sebagai berbayar kepadanya di bawah Sijil Pembayaran Kemajuan Penultimate tersebut.

[5] Dalam menangani tuntutan biasa seorang pembina bangunan di bawah Aturan 14, adalah wajar bagi Mahkamah mengambil suatu pendekatan yang robust. Antara lain, ini bermakna bahawa apabila sahaja sijil arkitek dikemukakan, Mahkamah harus memastikan bahawa defendan mengemukakan suatu keterangan yang kukuh sebelum izin untuk membela dibenarkan. Ianya juga bermakna bahawa dalam keadaan-keadaan yang sesuai, Mahkamah boleh saja menggunakan bidangkuasanya dalam Aturan tersebut, walaupun wujud peruntukan timbangtara yang menganjurkan penyelesaian dibuat melalui timbangtara.

[Rayuan dibenarkan. Keputusan Mahkamah tinggi diketepikan. Penghakiman terus diberi kepada perayu].

Cases referred to:

Northern Regional Health Authority v. Crouch [1984] 1 QB 644 ***(refd)***
Dawnays Ltd. v. F.G. Minter [1971] 1 WLR 1205 ***(foll)***
Hiap Hong & Co. Pte. Ltd. v. Hong Huat Co. (Pte) Ltd. [1987] 2 MLJ 551 ***(refd)***
Sutcliffe v. Thackrah [1974] AC 727 ***(refd)***
Mondel v. Steel [1841] 8 M & W p. 871 ***(refd)***
Mottram Consultants Ltd. v. Bernard Sunley Ltd. [1975] 91 L.Q.R. 471 ***(foll)***
Gold v. Patman [1958] 1 WLR 697
John Sisk & Sons v. Lawter Products B.V. [1978] April, Journal of the Institute of Arbitrators, Vol. 44, No. 3 ***(refd)***
Acsim (Southern) Ltd. vs. Danish Contracting Ltd. [1989] 47 BLR 59 ***(refd)***

Modern Engineering (Bristol) LTd. v. Gilbert Ash (Northern Ltd. [1974] AC 689 ***(refd)***
Alliance (Malaya) Engineering Co. Sdn. Bhd. v. San Development Sdn. Bhd [1974] 2 MLJ 94 ***(not foll)***
Kilby & Gayford Ltd. v. Selincourt Ltd [1973] 229 E.G. 1343 (C.A.) ***(refd)***
Ellis Mechanical Services Ltd. v. Wates Construction Ltd. [1978] 1 Lloyd's Rep. 33 ***(refd)***
Hua Khian Ceramics Tiles Supplies Pte. Ltd. v. Torie Construction Pte. Ltd. [1991] APCLR 515 ***(refd)***

Other sources referred to:
Construction Law Journal, 1994 pp. 190-202, "Loose Cannons in the Court of Appeal: On Demand Per Incuriam?", Ian Duncan Wallace QC
Law Quarterly Report [1973] 89, Set Back to Set-Off, Duncan Wallace QC, 86
Law Quarterly Report [1974] 90, Set Back to Set-Off, Duncan Wallace QC, 21
New Law Journal 141 [1976], "Dawnays, Gilbert-Ash and Mottram", Adrian L. Julian
Journal of the Institute of Arbitrators, Volume 44 Number 3, April, 1978
Hudson's Building Contracts and Engineering Contracts, 11th Edn. [1995] p. 854, para 6-194
Building Contracts, 4th Ed. p. 279, Donald Keating, QC

For the appellant - Low Kim Leng; M/s. Soo Thien Ming & Sharizat
For the respondent - Joginder Singh; M/s. Joginder Singh & co.

JUDGMENT

Edgar Joseph Jr. SCJ:

The issue of central importance to this appeal is whether, in O. 14 proceedings, upon the proper construction of a building contract dated 27 April 1989, ("the contract"), whereby the plaintiff, Pembenaan Leow Tuck Chui & Sons Sdn. Bhd. ("the builder"), had agreed to construct a private hospital to be named "Dr. Leela Medical Centre" for the defendant, Dr. Leela's Medical Centre Sdn. Bhd. ("the employer"), there is an obligation imposed upon the employer to pay at once the sum of RM433,288.97 appearing in the Penultimate Progress Payment Certificate issued on 3 August 1992, by the architect ("the Penultimate Progress Payment Certificate"), pursuant to clause 30(1) of the contract, regardless of pending disputes, including cross-claims by the employer alleging defective work or over-valuation, which allegedly exceeded the sum so certified.

More particularly, the gist of the affidavit of the managing director of the employer had alleged the following defective materials and workmanship: poor quality bricks, resulting in shrinkage and cracks; poor quality concrete workmanship, resulting in cracks in the floor of the operating theatre; basement leakage; defective water heater, causing the airconditioning unit to malfunction; pit of lift not being water proof, and so had caused the lift to malfunction.

The employer had further alleged by its statement of defence, that it was entitled to challenge the correctness of the Penultimate Progress Payment Certificate by referring the dispute to arbitration, by virtue of clause 34(1) which provides:

> 34(1) In the event that any dispute or difference should arise between the employer or architect on his behalf and the contractor, either during the progress or after the completion or abandonment of the works, as to any matter or thing of whatsoever nature arising thereunder or in connection therewith (including any matter or thing left by this contract to the discretion of the architect or the withholding by the architect of any certificate to which the contractor may claim to be entitled or the measurement and valuation mentioned in clause 30(5)(a) of these conditions or the rights and liabilities of the parties under clauses 25, 26, 31 or 32 of these conditions), then such disputes or differences shall be referred to arbitration.
>
> Upon the disputes or differences having arisen any party may serve written notice on the other party that such disputes or differences shall be referred to an arbitrator to be agreed between the parties or failing agreement or absence of reply or reluctance to act by the

other party then the party may, after the expiry of fourteen days from the date of the notice to concur on the appointment of 'an arbitrator, apply to the president or vice president for the time being of Pertubuhan Akitek Malaysia to appoint an arbitrator and such arbitrator so appointed shall by virtue of this agreement be deemed to be appointed with the agreement and consent of the parties to the contract.

Upon appointment the arbitrator shall with despatch initiate the arbitration proceedings following the provisions of the Arbitration Act 1952 (Revised 1972). The hearing may be "*ex parte*" should either party, having been given due notice, fail to attend.

Taking the second of these contentions by the employer first, the employer never did refer the dispute concerning the Penultimate Progress Payment Certificate, the subject matter of this appeal, to arbitration and having entered appearance and filed a defence to the action is precluded from taking advantage of the remedy of arbitration provided for in clause 34(1).

We note, in passing, the *dictum* of Sir John Donaldson MR in the Court of Appeal case of *Northern Regional Health Authority v. Crouch* [1984] 1 QB 644, that the "open up and revise" provisions of the sort provided for in clause 34(1) of the contract, and regularly encountered in the construction industry, had the effect that Courts, by contrast with arbitrators, would have no power to depart from the day to day opinions or decisions on the merits of certifying architects or engineers, and *a fortiori*, their certificates. This view, according to Sir John, had the advantage of reducing the backlog of overcrowded judicial lists of construction cases in the Court of the official referees. We note, however, that Crouch has come under heavy fire in an article by Mr Ian Duncan Wallace, QC entitled "Loose Cannons in the Court of Appeal: On Demand Per Incuriam?" reported in the *Construction Law Journal*, 1994, pp 190-202.

Turning to the first of the employer's contentions, alleging defective materials, workmanship and over-valuation, Counsel for the builder, in his reply, had attacked the *bona fides* of the these complaints by drawing our attention to a number of specific matters.

We did not, however, embark upon a consideration of the rights and wrongs of the complaints made by the employer regarding the builder's performance of the contract. This was because in the view we took of this appeal - after, of course, listening to the submissions of Counsel on both sides - the question of critical substance which arose for decision was: what were the obligations of the employer to pay upon being served with the Penultimate Progress Payment Certificate under the contract when, as here, the employer has made claims for liquidated and non-liquidated damages against the builder arising from its performance of the contract?

For the builder, it was contended that clearly, upon a proper construction of the contract, it was not open to the employer to rely on their claims for liquidated and non-liquidated damages by way of defence to the claim based on the Penultimate Progress Payment Certificate, for summary judgment under O. 14. It was said that these reliefs must be sought elsewhere.

On the other hand, for the employer it was contended that the answer to the question raised was far from clear, and that therefore, its determination should be left for the final hearing.

Broadly stated, in the High Court, at Kuala Lumpur (Commercial Division), the learned Judge (Mr. Justice Wan Mohammad) had held in favour of the employer giving it unconditional leave to defend, on the ground, that the affidavit evidence had disclosed triable issues, which required determination at a trial in open Court, and from that decision the builder had appealed to this Court.

It is well known to lawyers engaged in the field of construction contract law, that the question whether a building owner or main contractor, is entitled to refuse to make payment of money to a contractor or sub-contractor, as the case may be, allegedly due and payable under an interim certificate issued by an architect or engineer pursuant to provisions in a RIBA contract, and other known forms of building contracts and sub-contracts, on the ground that he has cross claims alleging defective work or over-valuation or damages for delay, is a question of ever recurring importance, which inevitably throws open for discussion the actual terms of the particular contract or sub-contract in the case and the all too familiar triology of cases of *Dawnays Ltd. v. F.G. Minter* [1971] 1 WLR 1205, *Modern Engineering (Bristol) Ltd. v. Gilbert Ash (Northern) Ltd.* [1974] AC 689, *Mottram Consultants v. Sunley (Bernard) and Sons* [1975] 2 Lloyd's Rep. 197, HL and their progeny.

To revert to the question of central importance to this appeal referred to in the opening paragraph of this judgment, we would make the preliminary observation that the Penultimate Progress Payment Certificate, the subject matter of this appeal, was, having regard to *Hiap Hong & Co. Pte. Ltd. v. Hong Huat Co. (Pte) Ltd.* [1987] 2 MLJ 551, undoubtedly an Interim Certificate within the meaning of clause 30(1) of the contract which provides:

> 30(1) At the period of interim certificate named in the appendix to these conditions the architect shall issue a certificate stating the amount due to the contractor from the employer, and the contractor shall, on presenting any such certificate to the employer, be entitled to payment therefor within the period for honouring certificates named in the appendix to these conditions. Interim valuations shall be made whenever the architect considers them to be necessary for the purpose of ascertaining the amount to be stated as due in an interim certificate.

We must now embark upon an analysis of the other relevant clauses in the contract and determine its scheme.

The period by which the architect is bound to make his estimate of the contract value of the work done and determine the sum which he considers is due to the builder and issue an interim certificate for such sum is one month from receipt of the progress claim. The period for the honouring of interim certificates issued under clause 30(1), is 21 days from date of presentation thereof to the employer.

In these circumstances, the question which arose for decision on clause 30(1) was when the amount certified in an interim certificate became due and payable.

It is obvious from a reading of clause 30(1), and the appendix to the contract - as we have already noted - that the builder shall be entitled to payment of the sum so certified within 21 days from the date of the presentation to the employer of an interim certificate. In other words, although the right to payment of the sum so certified will have accrued upon presentation of an interim certificate to the employer, payment thereof may not be enforced unti1 expiry of the period of 21 days.

We note that nowhere in the contract is there any provision for the payment of interest in the event of the employer being late with the payment of sums certified under clause 30(1).

Clause 30(2) explains how the amount certified in an interim certificate is to be calculated; it provides:

> 30(2) The amount stated as due in an interim certificate shall, subject to any agreement between the parties as to stage payments, be the total value of the work properly executed and of the materials and goods delivered to or adjacent to the works for use thereon up to and including a date not more than seven days before the date of the said certificate less

a any amount which may be retained by the employer (as provided in sub-clause (3) of this condition) and less any instalments previously paid under this condition. Provided that such certificate shall only include the value of the said materials and goods as and from such time as they are reasonably, properly and not prematurely brought to or placed adjacent to the works and then only if adquately protected against weather or other casualties.

Clause 30(3), read with the appendix to the contract, goes on to say that the maximum b permissible sum which may be retained by the employer referred to in clause 30(2), is RM215,730.21. Clause 30(3) provides:

30(3) The employer may retain the percentage of the total value of the work, materials and goods referred to in sub-clause (2) of this condition which is named in the appendix to these conditions as percentage of certified value retained. Provided always that when the sum of the amounts so retained equals the amount named in the said appendix as limit of c retention fund or that amounts as reduced in pursuance of clause 16(f) and/or clause 27(e) of these conditions, as the case may be, no further amounts shall be retained by virtue of this sub-clause.

The only provisions in the contract permitting the employer to make deductions from the sums certified by the architect are these:

d Clause 2(1) which deals with the costs of appointing other contractors to replace the builder when he does not comply with the instructions of the architect and to deduct the cost incurred thereby from any moneys due or to become due to the contractor under the contract; it provides:

2(1) The contractor shall (subject to sub-clauses (2) and (3) of this condition) forthwith comply with all instructions issued to him by the architect in regard to any matter in respect e of which the architect is expressly empowered by these conditions to issue instructions. If within seven days after receipt of a written notice from the architect requiring compliance with an instruction the contractor does not comply therewith, then the employer may employ and pay other persons to execute any work whatsoever which may be necessary to give effect to such instruction and all costs incurred in connection with such employment shall be recoverable from the contractor by the employer as a debt or may be deducted by him from any monies due or to become due to the contractor under this contract. f

In addition, the contract provides for a defects liability period of 12 months from the date named in the certificate of practical completion. (Clauses 15, 16 and 30).

The contract has, therefore, built into it a mechanism for deducting the cost of rectification of defective work from later progress payment certificates.

g Clause 19(3), which deals with the amount paid for insurance premium for insurance against injuries if the builder makes default in taking out such insurance; it provides:

19(3) Should the contrctor or any sub-contractor make default in insuring or in continuing to insure as provided in sub-clauses (1) and (2) of this condition the, employer may himself insure against any risk with respect to which the default shall have occurred and may deduct a sum equivalent to the amount paid in respect of premiums from any monies due or to h become due to the contractor.

i

Clause 20(A) which deals with the amount paid for fire insurance if the builder makes default in taking out such insurance; it provides:

> (20(A) The contractor shall in the joint names of the employer and contractor insure against loss and damage by fire, storm, tempest, lightning, flood, earthquake, aircraft or anything dropped therefrom, aerial objects, riot and civil commotion for the full value thereof (plus the percentage named in the appendix to these conditions to cover professional fees) all work executed and all unfixed materials and goods intended for, delivered to and placed on or adjacent to the works, but ' excluding temporary buildings, plant, tools and equipment owned or hired by the contractor or any sub-contractor, and shall keep such work, materials and goods so insured until practical completion of the works. Such insurance shall be with insurers approved by the architect and the contractor shall deposit with him the policy or policies and the receipts in respect of premiums paid; and should the contractor make default in insuring or continuing to insure as aforesaid the employer may himself insure against any risk with respect of which the default shall have occurred and deduct a sum equivalent to the amount paid by him in respect of premiums from any monies due or to become due to the contractor.

Clause 22 which deals with total fines for delay as certified by the architect; it provides:

> 22. If the contractor fails to complete the works by the date for completion stated in the appendix to the conditions or within any extended time fixed under clause 23 or clause 32(l)(c) of these conditions and architect certifies in writing that in his opinion the same ought reasonably so to have been completed, then contractor shall pay or allow to the employer a sum calculated at the rate stated in the said appendix as liquidated and ascertained damages for the period during which the works shall so remain or have remained incomplete, and the employer may deduct such sum from any monies due or to become due to the contractor under this contract.

We note, in passing, that according to the Penultimate Progress Payment Certificate, the subject matter of this appeal, the architect had stated that there had been a delay of 7 days and had imposed a fine which sum he had deducted from the sum certified to be due to builder.

Clause 25(3) which deals with total amount paid to suppliers or sub-contractors for goods and materials supplied; it provides:

> 25(3) In the event of the employment of the contractor being determined as aforesaid and so long as it has not been reinstated and continued, the following shall be the respective rights and duties of the employer and contractor:-
>
> (b) The contractor shall, if so required by the employer or architect within fourteen days of the date of determination, assign to the employer without payment the benefit of any agreement for the supply of materials or goods and/or for the execution of any work for the purposes of this contract but on the terms that a supplier or sub-contractor shall be entitled to make any reasonable objection to any further assignment thereof by the employer. In any case the employer may pay any supplier or sub-contractor for any materials or goods delivered or works executed for the purposes of this contract (whether before or after the date of determination) in so far as the price thereof has not already been paid by the contractor. The employer's rights under this paragraph are in addition to his rights to pay nominated sub-contractors as provided in clause 27(c) of these conditions and payments made under this paragraph may be deducted from any sum due or to become due to the contractor.

Clause 27(iii) which deals with total payments to nominated sub-contractors; it provides:

> 27(iii) That the nominated sub-contractor shall indemnify the contractor against the same liabilities in respect of the sub-contract works as those for which the contractor is liable to indemnify the employer under this contract.

Clause 30(3) which deals with the total retention sum which has been quoted above.

The seriousness of the requirement in the contract for the due honouring of an Interim Certificate is emphasised by clause 26(l)(a) and clause 30(6)(b). Clause 26(l)(a) which allows the builder to determine the contract or to suspend works if the employer does not pay the certified sum; it provides:

> 26(1) Without prejudice to any other rights and remedies which the contractor may possess, if
>
> (a) The employer does not pay to the contractor the amount due on any certificate within the period for honouring certificates named in the appendix to these conditions and continues such default for seven days after receipt by registered post or recorded delivery of a notice from the contractor stating that notite of determination under this condition will be served if payment is not made within seven days from receipt thereof.

Clause 30(6) which allows for adjustments in the final certificate if the adjustment is necessary in accordance with the terms therein contained; it provides:

> 30(6) So soon as is practicable but before the expiration of 3 months from the end of the defects liability period stated in the appendix to these conditions or from completion of making good defects under clause 15 of these conditions or from receipt by the architect of the documents referred to in paragraph (b) of sub-clause (5) of this condition, whichever is the latest, the architect shall issue the final certificate shall state:
>
> (a) The sum of the amount paid to the contractor under interim certificate and the amount named in the said appendix as limit of retention fund, and
>
> (b) The contract sum adjusted as necessary in accordance with the terms of these conditions,
>
> and the difference (if any) between the two sums shall be expressed in the said certificate as a balance due to the contractor from the employer or to the employer from the contractor as the case may be. Subject to any deductions authorised by these conditions, the said balance as from the fourteenth day after presentation of the final certificate by the contractor to the employer shall be a debt payable by the employer to the contractor or as the case may be as from the fourteenth day after issue of the final certificate shall be a debt payable by the contractor to the employer.

Clause 30(8) provides that no certificate other than the final certificate of the architect "shall of itself be conclusive evidence that any works materials or goods to which it relates are in accordance with this contract.

Clause 34(3) empowers the arbitrator "to ascertain and award any sum which ought to have been the subject of or included in any certificate and to open up, review and revise any certificate, opinion, decision, requirement or notice and to determine all matters in dispute ... in the same manner as if no certificate, opinion, decision requirement, or notice had been given."

Clause 34(2) although providing that references to arbitration "shall not be opened" until after practical completion or alleged practical completion of the main contract work, goes on

to provide by way of exception, *inter alia*, for disputes, as to "whether or not a certificate has been improperly withheld or is not in accordance with these conditions."

At this point, we would pause to note that the scheme of the contract indicates that the builder is to be paid at regular intervals in accordance with the value of the work he has completed.

Other provisions of the contract which touch on the authority and duties of the architect are these:

Clause 1(1) which shows that the contractor is obliged to execute and complete the works to the reasonable satisfaction of the architect; it provides:

> 1(1) The contractor shall upon and subject to these conditions carry out and complete the works shown upon the contract drawings and described by or referred to in the contract bills and in these conditions in every respect to the reasonable satisfaction of the architect.

Clause 2(1) imposes an obligation upon the contractor to comply with all instructions issued by the architect to him and clause 2(3) provides for the form which the instructions should take; they provide:

> 2(1) The contractor shall (subject to sub-clauses (2) and (3) of this condition) forthwith comply with all instructions issued to him by the architect in regard to any matter in respect of which the architect is expressly empowered by these conditions to issue instructions. If within seven days after receipt of a written notice from the architect requiring compliance with an instruction the contractor does not comply therewith, then the employer may employ and pay other persons to execute any work whatsoever which may be necessary to give effect to such instruction and all costs incurred in connection with such employment shall be recoverable from the contractor by the employer as a debt or may be deducted by him from any monies due or to become due to the contractor under this contract.
>
> 2(3) All instructions issued by the architect shall be issued in writing. Any instruction issued orally shall be of no immediate effect, but shall be confirmed in writing by the contractor to the architect within seven days, and if not dissented from in writing by the architect to the contractor within seven days from receipt of the contractor's confirmation shall take effect as from the expiration of the latter said seven days.

Clause 6 imposes a duty upon the architect to ensure that all materials, goods and works of the builder comply with the specifications, and results of tests and inspections; it provides:

> 6 (1) All materials, goods and workmanship shall so far as procurable be of the respective kinds and standards described in the contract bills.
>
> (2) The contractor shall upon the request of the architect furnish him with vouchers to prove that the materials and goods comply with sub-clause (1) of this condition.
>
> (3) The architect may issue instructions requiring the contractor to open up for inspection any work covered up or to arrange for or carry out any test of any materials or goods (whether or not already incorporated in the works) or of any executed work, and the cost of such opening up or testing (together with the cost of making good in consequences thereof) shall be added to the contract sum unless provided for in the contract bills or unless the inspection or test shows that the work, materials or goods are not in accordance with this contract.
>
> (4) The architect may issue instructions in regard to the removal from the site of any work, materials or goods which are not in accordance with this contract.

(5) The architect may (but not unreasonably or vexatiously) issue instructions requiring the dismissal from the works of any person employed thereon.

Pausing at this point, we would observe that nowhere in the contract is there any provision whereby the builder must execute the works to the satisfaction of the employer. In other words, according to the contract, the only instructions which the builder is under an obligation to comply with are those emanating from the architect. This, would be in accordance with the reasonable expectations of businessmen engaged in the construction industry. Were it otherwise and, say, the builder were also under an obligation to comply with instructions emanating from the employer, a situation could arise where the builder might be faced with conflicting instructions from the architect and the employer, with resulting confusion, not conducive to a smooth performance of a contract.

Cast in his role of a professional middleman, the architect should, *prima facie*, be in an ideal position to ensure that both employer and contractor punctually carry out their respective obligations under the contract. This is not to say that if the employer is dissatisfied with the performance of his architect, he is without remedy. In such a situation, the employer may terminate the services of his architect and appoint a substitute architect or even sue his old architect. (See *Sutcliffe v. Thackrah* [1974] AC 727).

It is true, that in the present case, the employer had terminated the services of the architect but this was at a very late stage, and bad replaced him with a new arcbitect. However, we were informed from the bar that no suit had, up to the date of the determination of this appeal, been commenced by the employer against the architect.

Article 3 says that the architect is appointed by the employer and that no person subsequently appointed shall be entitled to disregard or overrule any certificate given by the architect for the time being; it provides as follows:

3. The term 'the architect' in the said conditions shall mean the said Daya Bina Akitek (M) Sdn. of 58A, Kompleks Damai, Jalan Lumut, 50400 Kuala Lumpur or, in the event of his death or ceasing to be the architect for the purpose of this contract, such other person as the employer shall nominate for that purpose not being a person to whom the contractor shall object for reasons considered to be sufficient by an arbitrator appointed in accordance with clause 34 of the said conditions. Provided always that no person subsequently appointed to be the architect under this contract shall be entitled to disregard or overrule any certificate or opinion or decision or approval or instruction given or expressed by the architect for the time being.

Clause 15 empowers the architect to direct the builder to rectify any defects and faults in the works as a result of materials used or works done, which are not in accordance with the provisions of the contract; it provides:

15(1) When in the opinion of the architect the works are practically completed he shall forthwith issue a certificate to that effect and practical completion of the works shall be deemed for all the purposes of this contract to have taken place on the day named in such certificate.

(2) Any defects, shrinkages or other faults which shall appear within the defects liability period stated in the appendix to these conditions and which are due to materials or workmanship not in accordance with this contract shall be specified by the architect in a schedule of defects which he shall deliver to the contractor not later than 14 days after the expiration of the said defects liability period, and within a reasonable time after receipt of such schedule the defects, shrinkages and other faults therein specified shall be made good by the contractor and (unless the architect shall otherwise instruct, in which case the contract sum shall be adjusted accordingly) entirely at his own cost.

(3) Notwithstanding sub-clause (2) of this condition the architect may whenever he considers it necessary so to do, issue instructions requiring any defect, shrinkage or other fault which shall appear within the defects liability period named in the appendix to these conditions and which is due to materials or workmanship not in accordance with this contract to be made good, and the contractor shall within a reasonable time after receipt of such instructions comply with the same and (unless the architect shall otherwise instruct, in which case the contract sum shall be adjusted accordingly) entirely at his own cost. Provided that no such instruction shall be issued after delivery of a schedule of defects or after 14 days from the expiration of the said defects liability period.

(4) When in the opinion of the architect any defects, shrinkages or other faults which he may have required to be made good under sub-clauses (2) and (3) of this condition shall have been made good he shall issue a certificate to that effect, and completion of making good defects shall be deemed for all the purposes of this contract to have taken place on the day named in such certificate.

Pausing at this point, it is noteworthy that the architect had not invoked his powers under Clause 15 to direct the bilder to execute rectification works, arising from the complaints of the employer of defective works, materials and/or over-valuation. As already pointed out, the builder was under no contractual obligation to comply with these complaints of the employer unless supported by written instructions issued by the architect pursuant to Clause 2(1).

Having regard to the terms of the contract, if the employer had considered that the architect had failed in his duty to make the necessary deductions because of alleged defective work or materials as being not in accordance with the terms of the contract thus resulting in over-certification of the sums payable, the employer had three remedies open to him; namely:

(i) to request the architect to make appropriate adjustments in another certificate; or

(ii) if the architect declines to comply with that request, then to take the dispute to arbitration; or

(iii) to sue the architect. (See *Sutcliffe v. Thdckrath & Ors. (ibid)*).

To complete the pict ure of the factual matrix in this case, the following matters should be noted:

(1) There was contemporary correspondence passing between the parties and the architect which indicated that:

(a) the employer had repeatedly prevented the builder from carrying out repairs to works as certified by the defective architect;

(b) after the certified defects had been finally completed, the employer had prevented the exercise of a joint inspection by all concerned; and

(c) the employer had, at a very late stage, terminated the services of the architect and had refused to appoint a replacement, thus preventing the issuance of the final certificate.

(2) The building called "The Dr. Leela Medical Centre" was compl eted and a temporary certificate for occupation, dated 11 September 1990, was issued by the Dewan Bandaraya, Kuala Lumpur, pursuant to the provisions of the Street, Drainage and Building Act, 1974, and the Building Bye-Laws (Federal Territory, Kuala Lumpur) 1985.

The next part of the case which logically calls for consideration is a discussion of the cases *Dawnays, Gilbert-Ash, Mottram* and some of their progeny.

In the *Dawnays* case, a sub-contractor's application for summary judgment under O. 14 for recovery of sums of money contained in an interim certificate issued by the owner's architect, was opposed by the main contractor on the ground that clause 13 of the "green form" of nominated sub-contract provided: "The contractor shall notwithstanding anything in this sub-contract be entitled to deduct from or set-off against any money due from him to the sub-contractor (including any retention money) any sum or sums which the sub-contractor is liable to pay to the contractor under the sub-contract." There was also a comprehensive arbitration clause and clauses in *pari materia* with Clause 34(2), (3) and (8) in the present case, referred to above. The main contractor put in its affidavit setting up a cross-claim for delay and relied on the arbitration clause, saying it was ready and willing for the dispute to be referred to arbitration. It succeeded before the Master and the Judge to obtain a stay. The sub-contractor appealed. The main contractor's defence was given short shrift by the Court of Appeal. In the course of his judgment, Edmund Davies LJ (as he then was) who confined himself to the construction of Clause 13 of the sub-contract gave his **reasons** for rejecting the defence (at p. 1210 C4) - with which, incidentally, we entirely agree in the following terms:

> There is no doubt that, having made allowance for some three weeks' delay, an interim certificate was issued in favour of the sub-contractor in the sum of £27,000 odd. Accordingly, under the terms of clause 11(b) of the sub-contract, the sub-contactors were entitled, within 14 days of the receipt by the contractor of that certificate, to be paid the full amount thereof, subject only to such deductions as are specified in that sub-clause. These are, first, retention money; secondly, a cash discount of 2½ per cent on the difference between the total value and the retention money; and thirdly, amounts already paid. But clause 13, which is strongly relied upon by Mr. Knight, and understandably so, provides that:
>
> The contractor shall notwithstanding anything in this sub-contract be entitled to deduct from or set off against any money due from him to the sub-contractor (including any retention money) any sum or sums which the sub-contractor is liable to pay to the contractor under this sub-contract.
>
> Mr. Knight submits that clause 13 must be read together with clause 11(b), with the result that, wherever the main contractor asserts a money claim against a sub-contractor, he is entitled to deduct the amount of that claim against the sum to which the sub-contractor would otherwise be entitled under the interim certificate. That seems to me, with respect, an alarming submission. The result would be that the simple fact that the main contractor makes an assertion of some liability in the sub-contractor to pay him something is sufficient to entitle the former to hold up payment. The practical result would be to render available to any main contractor a ready means of avoiding payment out to the sub-contractor even of sums which the building owner had already paid the main contractor in respect of sub-contract work covered by interim certificates. That is, indeed, the position here, for the defendants have received every penny of the £27,000 now claimed. Can Mr. Knight utilise clause 13 in that way in the present case? In my judgment, clearly not. Its concluding words refer to 'a sum or sums which the sub-contractor is liable to pay' - not 'may be liable to pay', nor 'which is asserted by the main contractor to be due.' Mr. Knight cannot quantify even roughly what the sum is that the sub-contractor is so liable to pay. We are told that the main contractor asserts that as a result of unreasonable delays by the plaintiffs, a sum in the region of £47,000 may be payable. More recently, however, the claim is said to be in the region of £61,000. But all that is in the limbo of the unknown. The simple fact is that the defendants can assert no definite and liquidated sum as being unquestionably due to them from the plaintiffs. Unless and until

they can do this, they cannot invoke clause 13 in the manner sought by the defendants. Any other view would involve that the sub-contractor could be kept out of his money until the contract is completed, whereupon the main contractor would condescend to go to arbitration about the matter. In the result, a sub-contractor could be kept out of his money for an unconscionable period, with possibly disastrous financial results. I should require the clearest possible provision in the sub-contract before I would conclude that this was what the parties understood and intended and that this was, indeed, the result of the agreement arrived at.

There is express provision in the main contract, on the other hand, which deals with delay. It refers to deductions in respect of, any sum to which the contractor may be entitled in respect of delay in the completion of the sub-contract works or any section thereof.' This is notable, for it makes express provision for doing that which the defendants claim should be read into this sub-contract. I should have expected, if that were so, to find a similar express provision in the sub-contract also, but none is to be found.

I entirely agree with Lord Denning M.R. that, the claim advanced by the defendants being both challenged and lacking quantification, it is impossible to say that clause 13 affords them any relief. Accordingly these plaintiffs, who have done work valued and certified at E27,870, ought not to be kept out of their money a moment longer. I accordingly concur in saying that this appeal should be allowed.

Unfortunately, Lord Denning MR, who delivered the main judgment, in rejecting the defence of the main contractor after deciding the question of construction of clause 13 of the sub-contract in favour of the sub-contractor went on to make some general observations, which were in no way essential to the decision in the case, and were therefore obiter dicta, in the following terms (at p. 1208 E to G):

It must be remembered that a disputed claim cannot be referred at once to arbitration. Unless all agree, the determination of a disputed claim has to wait until the completion of the work. The arbitration clause makes that plain. It follows that, if Mr. Knight's contention is correct, it would mean that his clients could hold this money (which is the sub-contractor's money) indefinitely. They could hold on to it until the end of the main contract, that is, until the whole work was completed. They could then hold on to it still longer whilst the dispute was referred to arbitration. They would not have to pay it over until the arbitration was concluded, may be after a case stated to this Court. That seems to me to run counter to the very purpose of interim certificates. Every businessman knows the reason why interim certificates are issued and why they have to be honoured. It is so that the sub-contractor can have the money in on with his work and the he has to do. Take this very case. The sub-contractor has had to expend his money on steel work and labour. He is out of pocket. He probably has an overdraft at the bank. He cannot go on unless he is paid for what he does as he does it. An interim certificate is to be regarded virtually as cash like a bill of exchange. It must be honoured. Payment must not be withheld on account of cross-claims whether good or bad except insofar as the contract specifically provides.

In other words, by the above general observations, Lord Denning was suggesting that there was a special rule of construction applicable to cross claims in the building contract cases which operated in the opposite direction to the principle laid down in in *Mondel v. Steel* [1841] 8 *M & W* at 871, 872 which is that when the buyer of the goods or the person for whom the work has been done is sued by the seller or contractor for the price it is open to the defendant, in the absence of a provision in a contract to the contrary, to defend himself by setting off or setting up against the amount claimed, any damages which he has sustained as a result of the plaintiff's breach of the contract under which the goods were sold and

delivered or the work and labour done and thus showing how much less the subject matter of the action was worth, by reason thereof.

With all due respect to Lord Denning, for the reasons stated in the later House of Lords case of *Gilbert-Ash*, we are unable to agree with him that an interim certificate or indeed any certificate issued by an architect or engineer pursuant to provisions of the R.I.B.A. and other known forms of building contracts and sub-contracts are to be treated virtually as cash like a bill of exchange.

In our view, therefore, there is no special rule of construction operating in the building contract cases - such as was advocated by Lord Denning by way of *obiter dictum* in the *Dawnays* case - which lays down that contracts with provision for payment on certificates negative the ordinary common law right of set-off enunciated in *Mondel vs. Steel (ibid)*.

In other words, we agree with the following passage in the judgment of Lord Morris in the *Gilbert-Ash* case (*ibid* at p. 699G, H.):

> When parties enter into a detailed building contract there are, however, no over-riding rules or principles covering their contractual relationship beyond those which generally apply to the construction of contracts: ... Nor, if a contract provides for the issuing of interim certificates,, should it be supposed that debts of a special class will come into existence, i.e. debts in relation to which there cannot under any circumstances be any defence or set-off.. Provisions governing such interim certificates will probably be found in the contract.

But, having said that, it would be wrong to assume that just because the House of Lords had over-ruled the above dictum of Lord Denning quoted above - including its suggestion that there was a special rule of construction applicable to cross claims in the building contract cases which, operated in the opposite direction to the principle laid down in *Mondel v. Steel* which for brevity and convenience, we would call the bill of exchange principle, that it had held that *Dawnays* was wrongly decided by the Court of Appeal.

We would interpolate, to remark, that the *Dawnays* case did not prevent the owner's or main contractor's cross-claims being litigated or arbitrated at the end of the day, but for all practical purposes, it conferred "temporary finality" on the certificate and a right to immediate payment in full in the absence of an express contractual provision permitting deduction of the matter in question.

This leads us to an analysis of the judgments of the Law Lords in the *Gilbert-Ash* case in order to determine their impact on the *Dawnays* case.

We must, at this point, interject to mention that we have read, with much profit, the learned articles which have a bearing on this part of the case. We refer, in particular, to the articles by no less an authority than Mr. Duncan Wallace Q.C. entitled "Set Back to Set-Off" [1973] 89 L.Q.R. 86; "Set-fair for Set-off" [1974] 90 LQR 21; his note on *Mottram Consultants Ltd. v. Bernard Sunley Ltd.* [1975] 91 L.Q.R. 471 and, per contra, to the article by Mr. Adrian L. Julian entitled "*Dawnays, Gilbert-Ash and Mottram*" [1976] New Law Journal 141.

Now, in the *Gilbert-Ash* case, the subcontract in question was not in standard form, the set-off providing by condition 14:

> If the sub-contractor fails to comply with any of the conditions of this sub-contract, the [main] contractor reserves the right to suspend or withhold payment of any monies due or becoming due to the sub-contractor. The [main] contractor also reserves the right to deduct from any payments certified as due to the sub-contractor and/or otherwise to recover the

amount of any bona fide contra accounts and/or other claims which he, the [main] contractor, may have against the sub-contractor in connection with this or any other contract.

It was held, on the true construction of condition 14 of the sub-contract, the words present (which were materially different from clause 13 of the sub-contract in the *Dawnays* case, quoted supra) clearly gave the main contractors the right to deduct from any payments certified as due to the sub-contractors **quantified amounts bona fide claimed** by them from the sub-contractors.

In *Gilbert-Ash*, their Lordships were concerned, with respect to construction industry contracts, to give the quietus to any suggestion that there were any special rules applicable to cross-claims in the building industry such as had been enunciated by Denning MR in the *Dawnays* case.

More particularly, their Lordships made it clear that the proposition that rights of set-off or counter-claim could not be raised in answer to interim certificates, as a matter of course, was quite untenable, and that each case turned upon the particular wording of the contract. Lord Salmon said (at p. 722-3) - and we totally agree - that:

> The parties to building contracts or sub-contracts, like the parties to any other type of contract, are of course, entitled to incorporate in their contract any clause they please. There is nothing to prevent them extinguishing, curtailing or enlarging the ordinary rights of set off, provided they do so expressly **or by clear implication.**
>
> (Emphasis provided)

However, Lord Diplock appears to have required a somewhat stronger indication of an intention to displace the rights of set-off than did Lord Salmon and the other Law Lords who comprised the Court, when he said (at p. 717):

> But in construing such a contract (a building contract) one starts with the presumption that niether party intends to abandon any remedies for its breach arising by operatian of law, and clear express words must be used in order to rebut this presumption.
>
> (Emphasis provided)

In the *Dawnays* case, the contest was between the contractor and sub-contractor and the question for decision was whether, upon a proper construction of the sub-contract in the RIBA form, the contractor was entitled to deduct from the monies certified to be due to the sub-contractor, only sums established or admitted to be payable by the sub-contractor to him, or in addition, claims exceeding the sums certified to be due which were in dispute. This question of construction was obviously not free from difficulty for, as appears from the judgments of the House of Lords in the *Gilbert-Ash* case, there was a division of opinion.

Of the five Law Lords who comprised the Judicial Committee, only two - namely, Lord Diplock and Lord Salmon - considered that the Court of Appeal had been wrong in deciding the construction point in the *Dawnays* case in favour of the sub-contractor. As for Viscount Dilhorne, this is what he said on the point at issue (at p. 213B):

> If the loss in the *Dawnays* case had been quantified as it was in the present case the decision in the *Dawnays* case would have been wrong.
>
> (Emphasis provided).

But the loss in the *Dawnays* case was not quantified, as appears quite clearly from the judgment of Edmund-Davies LJ, quoted above, which would necessarily imply that Lord Dilhorne too considered that the construction point had been rightly decided by the Court

of Appeal in the *Dawnays* case. The remaining two Law Lords, namely, Lord Reid and Lord Morris of Borth-Y-Gest, considered that *Dawnays* was probably rightly decided.

In *Mottram Consultants Ltd. v. Bernard Sunley & Sons Ltd.* [1975] 2 Lloyd's Rep.197, the House of Lords had to consider a particular building contract providing for interim certificates, and the question for decision was whether the defendant employer Mottram could claim a set-off of money allegedly owed to it by the plaintiff builder Sunley.

On the particular contract before them, the House of Lords held, dismissing the defendant *Mottram's* appeal by a majority of 3 to 2 (Lord Cross of Chelsea, Lord Wilberforce and Lord Hodson, Lord Salmon and Lord Morris of Borth-Y-Gest dissenting) that the right of set-off had been excluded and that Sunley was entitled to summary judgment and leave to defend was refused.

We note that in his powerful dissenting judgment, Lord Salmon in the *Mottram* case pointed out - in our view quite correctly - that the effect of the majority view was to depart from what had been held by the House of Lords in the *Gilbert-Ash* case, in so far as it purported to over-rule *Dawnays*. Lord Salmon said (at p. 215):

> In my opinion, the only possible basis for their decision was the authority upon which they relied but which has subsequently been over-ruled by your Lordships' House. Accordingly, their decision cannot, in my view, be allowed to stand unless your Lordships are prepared to depart from what was decided in this House only a few months ago, and in addition, to uproot the principles governing RSC, O. 14 proceedings which have been well settled for generations.

And, at p. 216, his Lordship added this:

> For my part I am convinced that it would be impossible and contrary to all authority (save the *Dawnays'* line of cases which has been over-ruled) to allow the summary judgment against *Mottrams* to stand in circumstances such as these:

But, more importantly, the significance of the *Mottram* case lies in the judgment of Lord Cross, which contains the reasons for the majority view, and which shows him applying the principle, in unmistakable terms. Lordship said: (at p. 209):

> One must, I think, first ask oneself what the position would have been had the contract not been varied. Suppose that *Mottrams* were alleging that the architect had negligently stated in several interim certificates that expenses had been incurred by the contractor in executing the works which had not in fact been incurred and were claiming to deduct the amounts which they said had been improperly included in the earlier certificates from the amount stated to be due in a subsequent certificate. In the absence of any suggestion of fraud on the part of the architect or the contractor - and there is, of course, no suggestion of fraud here - I cannot see how it could have been argued that such a deduction could be made. Condition 28(d) states that the only sums which can be deducted from the amount stated to be due in an interim certificate are (i) retention money and (ii) any sum previously paid. It is, moreover, to be noted that the printed form which the parties used provided for a third permissible deduction which the parties deleted.
>
> (Emphasis provided).

The deletion of the clause containing a third permissible deduction was therefore an additional and not a decisive reason, for the decision of the majority. In other words, even disregarding the fact that the parties had deleted the third permissible deduction clause, the

decision of the majority in *Mottram* would have been the same, and so it cannot be said that the *ratio decidendi* of the case turned on this narrow point of construction.

We are fortified in the view we take of the *ratio decidendi* of *Mottram* by the fact that both Lord Hodson and Lord Wilberforce, had concurred with the whole of the judgment of Lord Cross, in unqualified terms.

In this context, we have not overlooked the point that in the *Gilbert-Ash* case, Lord Diplock had said (at p. 719 G) that "the *expressio unius* rule of construction cannot be prayed in aid to exclude the right of the employer to set up breaches of other warranties in diminution of or extinction of the instalment of the purchase price stated in the certificate as due." As against that, Lord Reid, the presiding Law Lord in the same case, was clearly of the view that the principle did apply. Moreover, the case of *Gold v. Patman* [1958] 1 WLR 697 affords an illustration of the application of the *expressio unius* principle against a building owner.

In our view, therefore, the express enumeration of permitted set-offs in a contract or sub-contract, can imply that a defendant builder or main contractor, as the case may be, is limited to making such deductions from the amounts claimed as fall strictly within the scope of the permitted set offs, and nothing else, on the basis of the *expressio unius* principle.

In the present case, there are seven express provisions in the contract to which we have referred whereby the employer has the right of set-off but none of them is relevant to its alleged right to make the set-off for which it contends.

In our view, regard being had to these provisions of the contract, and applying the *expressio unius* principle, so far as claims for payment on certificates are concerned, the ordinary common law right of set-off had, in the words of Lord Salmon in the *Gilbert-Ash* case at pp. 722-3, quoted above, been extinguished, not expressly but by clear implication.

We are further supported in the view we take by a decision of the Irish High Court, 1976/ 1124, in *John Sisk & Sons v. Lawter Products B.V.* digested in "*Arbitration*", the Journal of the Institute of Arbitrators, Volume 44 Number 3, April, 1978. In this case, the question as to the right of a contractor to obtain payment from an employer under a building contract on the basis of interim certificates issued by the architect where the certificates were disputed by the employer was considered.

The contract was the standard form (1966 Edition) issued by the Royal Institute of The Architects of Ireland and it included provision for payments to be made from time to time during the progress of the works on the basis of certificates to be issued by the architect.

Three interim certificates had been issued by the architect but had not been honoured by the defendants. The plaintiffs claimed summary judgment for the amount of the certificates and the defendants objected on the grounds that the plaintiffs were in breach of contract by failing to complete the works by the agreed dates and that, as a result, the defendant had suffered damages.

Finlay J, in his judgment commented upon the decision of the English Courts - the *Dawnays* and *Gilbert-Ash* cases - which provided valuable guidance as the precise issue in the dispute did not appear to have been previously decided by the Irish Courts.

Finlay J stated that the true test was not whether the common law right of set-off, had by the terms of the building contract been unequivocally excluded, but rather as to **whether all the relevant terms of the building contract were in any particular event inconsistent with the exercise** in that event of such a set-off.

The learned Judge referred to the following clauses in the contract:

(a) a right of the contractor to payment of the amount certified subject only to specified deductions as in Clause 29 (in *pari materia* with **clause 30(2)** of the Contract in the present case).

(b) a right of the contractor to **suspend** the work on mere non payment on an interim certificate (in *pari materia* with **clause 26(1)** of the Contract in the present case).

(c) a specific right of each party to refer disputes to arbitration not to be opened until after the practical completion of the works (in *pari materia* with **clause 34(2)** of the Contract in the present case).

and held that the common law right of set-off was inconsistent with the above stated provisions and as such, allowed the plaintiff to enter summary judgment as claimed.

We agree that the effect of the judgment is to protect the essential requirement for interim payments, without which all but the smallest building contracts would be impossible provided that the other provisions of the standard form of the building contract are properly incorporated.

To revert to the contract in the present case, in applying the *expressio unius* rule, as aforesaid, we have not overlooked the case of *Acsim (Southern) Ltd. vs. Danish Contracting Ltd.* [1989] 47 BLR 59, which would appear to be authority for the proposition that the mere express enumeration of permitted set-offs in a building contract does **not** imply that the defendant is confined to those remedies and nothing else, on the basis of the *expressio unius* principle.

Having said that, we would reiterate that the *Dawnays* case was rightly decided on the question of construction of clause 13 of the sub-contract there, for the reasons given by Edmund-Davies LJ reproduced above.

In so holding, we must also add, that we have not overlooked the cogent submission advanced by Mr. Duncan Wallace Q.C. in his excellent work, *Hudson's Building Contracts and Engineering Contracts*, 11th Edn. (1995) (at p. 854, para 6-194) that "...it is of the essence of most interim payment provisions based on valuation of work done that the valuation relates to all the work done to date, not of the work since the last interim certificate. As a result, regarded from the owner's point of view, many errors of valuation arising, for example, from overestimation of the quantities of work done, or from the subsequent discovery of defective work or materials previously allowed as being satisfactory, can be expected to be rapidly and automatically remedied in a subsequent certificate, unless there is disagreement on the merits between the owner and his A/E."

As for the case of *Alliance (Malaya) Engineering Co. Sdn. Bhd. v. San Development Sdn. Bhd* [1974] 2 MLJ 94, we regret that we are unable to agree with the following passage (at p. 99 col IB, C) in the judgment of Gill CJ, when speaking for the Federal Court, regarding the effect of the *Gilbert-Ash* case on the *Dawnays* case, except on the bill of exchange principle:

> It was held by the Court of Appeal (in *Dawnays* case) that since the main contractors' cross-claim for damages for delay was challenged and had not been quantified, it did not come within clause 13 of the sub-contract. *Dawnays* case, however, was disapproved by the House of Lords in *Gilbert Ash (Northern) Limited v. Modern Engineering (Bristol) Limited* in which it was held that the common law right of a defendant to a set-off could only be taken away by clear, unequivocal words. Although this decision of the House of Lords was not binding

on the learned trial Judge, I do not think he was wrong in following it.

Gill CJ's view of the effect of the *Gilbert-Ash* case on the *Dawnays* case was, with respect, a *mere ex cathedra* pronouncement, made without any attempt at an analysis of the judgments of the Law Lords who comprised the Court in the *Gilbert-Ash* case. Had he done so, as he undoubtedly should have, he might well have come to the conclusion - as we have - that three of the Law Lords in that case considered that the *Dawnays* case was rightly decided on the point regarding construction of clause 13 of the sub-contract. In any event, if we may add, at the risk of being tedious, Lord Salmon had stated, quite categorically, in the House of Lords case of *Mottram*, that the effect of the majority view in *Mottram*, was to depart from what had been held in the *Gilbert-Ash* case, in so far as it purported to over-rule the *Dawnays* case.

Gill C.J. also failed to note the contrast in the wording of clause 13 of the sub-contract in the *Dawnays* case with condition 14 of the sub-contract in the *Gilbert-Ash* case - a point to which we have alluded. Indeed, in the *Gilbert-Ash* case, Lord Morris had pointed this out (at p. 702C) in the following terms:

> In that case (*Dawnays* case) it was necessary to consider the meaning of certain words in a sub-contract which was different from the sub-contract now before us. Clause 13 of the sub-contract in that case is to be contrasted with condition 14 in the present case. Clause 13 entitled the contractor Ito deduct from or set off against any money due from him to the sub-contractor (including any retention money) any sum or sums which the sub-contractor is liable to pay to the contractor under this sub-contract.'...
>
> The decision of the Court of Appeal in that case (*Dawnays* case) turned upon the meaning of the particular words there in question: it cannot guide decision in the present case. Leave to appeal was refused by the Court of Appeal and a subsequent petition for leave-to appeal was dismissed. Had the case come up for review I consider, as at present advised, that an appeal ought to have failed.

In all the circumstances, our conclusion therefore, is, that having regard to the meaning of the particular words of the contract, in particular the clauses which we have referred to and discussed, there is a clear implication that the parties had intended that so far as claims for payment on certificates are concerned, the ordinary common law right of set-off was to be extinguished.

That was sufficient to conclude this **appeal** in favour of the builder. However, there are certain general observations we should like to add by way of postscript.

When, upon the proper construction of a particular contract - which, of course, is a question of law - there is **no** obligation on the part of an employer in a main contract, or a main contractor in a subcontract, to pay upon being served with a progress payment certificate, because of pending disputes, allegations of defects in works or materials or claims for damages for delay, without giving some reasonable amount of detail and quantification, are unlikely to result in the dismissal of an application for summary judgment under O. 14 and leave to defend being given. (See *Kilby & Gayford Ltd. v. Selincourt Ltd* [1973] 229 E.G. 1343 (C.A.)).

As for the degree of proof required of a plaintiff builder in O. 14 proceedings based upon an interim certificate issued by an architect or engineer pursuant to a construction contract, this has been variously described in *Ellis Mechanical Services Ltd. v. Wates Construction Ltd.* [1978] 1 Lloyd's Rep. 33 as "indisputably due" (per Denning MR t p.35), "as plain as

could be" (per Denning MR at p. 36) or "beyond reasonable doubt" (per Bridge LJ at p.37). In his book on *Building Contracts*, 4th Ed. Mr. Donald Keating, Q.C., under the sub-heading "Evidence supporting application for summary judgment", at p. 279, says this:

> Every case turns upon its facts but excellent evidence is either an admission by the defendant, or his authorised agent, or a certificate by the defendant's architect or engineer, which is a special and formal kind of admission. When evidence of this nature is established the court usually requires cogent evidence from the defendant before it grants leave to defend. Thus merely to allege the existence of defects in the works, or a claim for damages for delay without in each case giving some reasonable amount of detail and of quantification is unlikely to result in leave to defend.

In this context, the following passage in the judgment of Lawton LJ in the *Ellis* case (*ibid* at p. 36), indicates the correct approach which our Courts should adopt in ordinary builder's claims under O. 14:

> If the main contractor can turn round, as the main contractor has done in this case and say 'Well, I don't accept your account; therefore there is a dispute', that dispute must be referred to arbitration and the arbitration must take its ordinary long and tedious course. Then the sub-contractor is put into considerable difficulties. He is deprived of his commercial life blood. It seems to me that the administration of justice in our Courts should do all it can to restore that life blood as quickly as possible ... In my judgment it can be done if the Courts make a robust approach, as the Master did in this case, to the jurisdiction under O. 14.

In the Singapore case of *Hua Khian Ceramics Tiles Supplies Pte. Ltd. v. Torie Construction Pte. Ltd.* [1991] APCLR 515, at 522 and 523, G.P. Selvam JC (as he then was) approved of Lawton L.J's robust approach to the jurisdiction under O. 14 in a construction contract case.

Also to the point, are the four subsequent passages in the judgment of Lawton L.J in the *Ellis* case which, we consider, afford valuable guidance and read as follows:

> When the cocoon of legal argument which has been wrapped round this case with great skill by Mr. Keating is unravelled, what is left is this; it is a straightforward case, save for the amount, of a claim by a builder for work done and materials supplied. It is the sort of case which would normally be dealt with by a common form affidavit for the purposes of the O. 14 jurisdiction. The sub-contractors in this case did not think it right to deal with the matter by means of a common form affidavit. What they did was to produce long, carefully worded affidavits, giving a great deal of information to justify their claim. Mr. Keating has attacked that claim. What does his attack come to?
>
> He says, first, that his clients do not know what work was done; secondly that they have not had an opportunity of looking at the supporting documents; thirdly, that they suspect that the plaintiffs have miscalculated the basis of their claim; and finally that they suspect that a lot of the work is defective.
>
> Now if a householder puts in an affidavit like that in answer to an ordinary builder's claim before the Master under O. 14, he would get very short shrift indeed, because it has long been accepted that it is not an answer to a summons for judgment under O. 14 to say 'I dispute the claim and I suspect that it has been wrongly formulated.' The ordinary practice is that there must be some real basis, not a shadowy basis, for showing that there is an issue worthy of investigation by the Courts. The defendants' answer amounts to no more than 'We dispute the claim'. That is not enough.
>
> I have not overlooked that on the authorities, and in particular the decision of this Court in *Contract Discount Corporation Ltd. v. Furlong and Others*, there are cases which merit unconditional leave to defend, even though the defendant is not able to point to any specific ground for contesting the claim. Each case must be decided on its own facts and with a degree of robustness, remembering what the background is.

In all the circumstances, we had no hesitation in allowing this appeal with costs both here and below, setting aside the judgment of Mr. Justice Wan Mohammed and substituing, in lieu thereof, summary judgment in favour of the builder for the sum certified to be due and payable to it under the Penultimate Progress Payment Certificate and interest thereon as prayed. The employer is, of course, at liberty to litigate its cross-claims aforesaid, should it so wish.

Deposit paid into Court by way of security for costs, was ordered to be refunded.